

Contract Law in Hong Kong

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Preface

When Desmond Greenwood and I produced the first edition of this book, in 2007, we noted that it was the first comprehensive student text on this subject for over 10 years. Fifteen years later, with the publication of this fourth edition, it remains one of very few textbooks focused on Hong Kong contract law at the undergraduate or graduate level.

Much has changed in the Hong Kong legal arena since 2007. Many of those changes directly affect contract law; others do so more tangentially. Hong Kong's first post-1997 Chief Justice, Andrew Li, who did so much to maintain Hong Kong's judicial independence and autonomy, has gone but his legacy is an important one. By making consistent use of the facility, provided for in the Basic Law, to invite overseas judges to sit in the Court of Final Appeal (CFA), Chief Justice Li helped to ensure that Hong Kong's appellate judges are constantly exposed to influences from elsewhere in the common law world. Nor is "traffic" all one way, as Hong Kong is gradually being recognised as a "source" of common law wisdom, as well as its recipient. This is vital for the development of Hong Kong's jurisprudence and will, over time, ensure that Hong Kong's law (including its contract law) will develop a flavour of its own. Exposure to external common law sources is crucial at a time of increasing "localisation" of the judiciary and the increasing use of Cantonese in the courts. While there is much to welcome in this development, it poses the risk of insularity, as Chief Justice Li so wisely observed. It is to be further welcomed that under Andrew Li's successor, Geoffrey Ma CJ, exposure to "external" common law judicial influence has continued, despite some hostility from the so-called "loyalist" camp for whom judicial autonomy is an anathema. Time will tell whether Ma CJ's successor, Andrew Cheung, will continue to encourage the crucial exposure to "external" common law sources. It is a matter of regret that this exposure to other common law experience is now under threat, with the resignation of some overseas CFA judges and the prospect of more.

Not all changes, to put it mildly, have been for the better and, while the use of Chinese suggests increased "access" to law for Hong Kong's citizens, this is significantly countered by increased legal costs which put litigation out of the reach of

many. Promises to increase legal aid spending have been implemented, but access to justice remains out of reach for many in the “sandwich class”. Increased support for mediation and assistance for the unrepresented litigant are a poor substitute for the provision of adequate legal aid. This affects the nature of contract cases contested at the highest level, where property (land) issues dominate, and partly accounts for the observation that there have been few landmark contract cases in Hong Kong in the past few years. That said, there has been significant development and refinement of existing principles and the Court of Final Appeal, far more active than its Privy Council predecessor, has led the way.

This fourth, considerably expanded edition seeks to deal with the major Hong Kong contract case law (and, to a limited extent, statutory law) since it last went to press in 2011. Additionally, I have sought to “fill in gaps” which our prior commitment to conciseness may have engendered. Of course, more recent decisions from elsewhere in the common law world have also been included and I make no apology for the fact that these are predominantly English decisions, given Hong Kong law’s long-standing and continuing links to the English common law. Nevertheless, as we said in introducing the first edition, “‘1997’ has presented Hong Kong with the opportunity to develop a unique jurisprudence, influenced by a combination of sources—from the former colonial power, from China mainland and, most important, from within Hong Kong itself”.

Given the developments in contract law since 2017, I feel that a revised, expanded and readable text, suitable for law students, is long overdue. I stress “readability” since, except for the largely descriptive first two chapters, this text places particular focus on the “stories”, the cases which form the foundation of Hong Kong contract law. As a “common law”-based jurisdiction, Hong Kong’s law derives primarily from the decided cases and this is particularly true in the areas of contract and tort law. While legislative rules are an increasingly important source of Hong Kong contract law, especially in the area of consumer protection and, lately, privity, the role of legislation remains to “fill the gaps” rather than, as in civil law jurisdictions, to provide a complete, codified legal framework. I believe, therefore, in conveying contract law through the careful examination and explanation of case illustrations. This has the further advantage that the study of cases is far more reader-friendly than a focus on dense, legalistic text, especially given that many readers will be studying law in their second language.

As already implied, this book is written principally for the law student, though it should be of interest to students of other disciplines who need an understanding of contract law. I am also gratified to know that many members of the legal profession here have expressed interest in, and support for, this text.

Finally, I wish briefly to explain two issues of style. The first relates to the use of terms such as “plaintiff”, “defendant”, etc. In England, though not in Hong Kong, the terminology has changed over the last few years such that the former “plaintiff”

has now become the “claimant”. What I have endeavoured to do throughout is to use the terminology prevalent at the time a particular case was reported. The second explanation relates to the use of the expression “he” to include both the masculine and the feminine. This “Interpretation Act” approach avoids the use of the clumsy s/he pronoun or the grammatically incorrect use of “they” and “their” to indicate a gender-neutral singular. I am, of course, fully aware that women make contracts and have full contractual capacity in Hong Kong.

I have endeavoured to state the law accurately as of 25 February 2023.

MJF

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1

The Nature of Contract Law in Hong Kong

OVERVIEW

Contracts may take a huge variety of forms; from the simplest, small “one-off” transaction like buying a newspaper, to a complicated commercial contract, written in technical language and intended to be of lengthy duration. Nevertheless, the same basic rules as to formation, performance and enforcement apply to all contracts.

The purpose of this chapter is to ask what contract law is, what it does and what, if anything, is unique or special about Hong Kong contract law. In keeping with the largely non-theoretical nature of this book and the constraints of space, the answers to the above questions will be based on traditional notions of contract and more radical formulations will be merely alluded to. This should not be taken as a rejection of more radical views but an assertion that the objective is to reflect how contract law is generally viewed, by traditional judges, lawyers and legal writers.

In asking what contract law is, we may begin with the statement that contracts are *legally enforceable agreements*. In defining contract, these two elements: an agreement between the parties, and some form of enforcement thereof, are crucial. We might, perhaps, wish to add another requirement; the agreement should not have been procured by improper means such as threats or dishonesty. We would also wish to qualify the first basic element, since agreement, especially where the parties are of unequal bargaining power, is often more theoretical than real. I may make a contractual “agreement” to travel on a bus every morning but if I dislike the “infotainment” provided or the sub-zero air conditioning I am in a “take it or leave it” situation, unable to vary the conditions of travel or to negotiate a reduced fare for travelling in discomfort. My alternative is to walk or take a taxi!

The notion of “agreement” must also be qualified by saying that whether parties have agreed is usually judged “objectively” rather than “subjectively”. This means that what is actually in a party’s mind is usually irrelevant; what matters is that a “reasonable person”, assessing the party’s words and deeds, should conclude that he has “agreed”.

Moreover, agreement, while a necessary requirement of contract, is not a sufficient one; many agreements may lack contractual force because of other deficiencies. A particular feature of contract in common law systems, such as Hong Kong and England, is the requirement of “consideration” which means, essentially, that no one may enforce an agreement unless he has given something of value to the other party to the agreement, either in the form of a “benefit” to that other party or a “detriment” to himself. Further, an agreement may be non-contractual where it is viewed by the courts as a purely social arrangement, never intended to be legally binding. Additionally, a party to an agreement may be found to lack contractual “capacity” because of his youth or other disability; some agreements, such as those concerning the transfer of land, may lack the necessary written formality; and the threats or dishonesty mentioned above may constitute “vitiating” elements sufficient to invalidate the agreement. Nevertheless, despite these additional requirements, *agreement* remains the fundamental basis for contractual liability. Legal obligations may exist in the absence of agreement but they will not be contractual ones.

The element of “enforceability” in contract law also requires qualification in so far as it implies that parties may be required to honour their promises. In fact, actual “enforcement”, by an order known as “specific performance”, is exceptional and the normal result of the breach of a contractual undertaking by one party is that he is required to pay monetary compensation (damages) to the “innocent” party.

Nonetheless, enforcement, in the sense of being entitled to seek legal redress for breach, is what distinguishes contracts from other, non-binding types of agreement. While parties may seek to avoid litigation, especially where they have dealt with one another over a long period, the importance of the right to seek compensation for breach “as a last resort” is fundamental.

Having outlined what contract is, we next need to ask what it “does”. In traditional terms, the law of contract, put most simply, allows people to make their own contracts with minimal interference and then insists on performance. In theoretical language, these are known as the principles of *freedom* and *sanctity* of contract. “Freedom of contract” denotes that it is for the parties to make their own contracts without the intervention of government, legislation or the courts. “Sanctity of contract” upholds the principle that once agreements are made they should be honoured. Where a contracting party does not honour the agreement, the other party will be entitled to a legal remedy.

Freedom of contract has never been total, either in Hong Kong or England; it has always been recognised, for example, that a contract to do something criminal would be unenforceable. Legislative restrictions on contractual freedom in most common law jurisdictions have, indeed, now become so numerous that many writers regard freedom of contract as of only historical importance. Such restrictions have been engendered primarily by a recognition that the main beneficiaries of complete contractual freedom are the rich and powerful. Legislation has gone some way to

redressing the balance, particularly in the areas of consumer protection and employees' rights. Hong Kong governments, however, have had, since colonial times, a barely-concealed "close relationship" with big business, such that legislative intervention into the so-called "free market" has been avoided, where politically possible, and otherwise delayed. This reluctance to act is exemplified by Hong Kong's inadequate employment protection laws, limited control of anti-competitive practices, and relatively undeveloped consumer protection legislation.

Sanctity of contract, unlike freedom of contract, has remained largely intact in the common law world. It remains the case that, unless the performance of a contract becomes illegal or impossible, full performance, or at least compensation for failure to perform, is required.

1.1 What Contract Is

A contract may be described as a "legally enforceable agreement". That simple statement summarises the rules on contract to be found in the decided cases and the relevant legislation.¹ The element of *agreement* is of crucial importance since, while not all agreements are contracts, all contracts require at least an apparent agreement. Moreover, it is the element of agreement that distinguishes contracts from other forms of obligation, notably tortious ones.

The need for "agreement", however, must be qualified. First, it is clear that in many cases agreement is more apparent than real. The idealised view of agreement involving intense haggling, give and take and ultimate consensus is replaced, in many cases, by something more akin to "take it or leave it". The consumer who buys a new car, signs a contract for electricity supply, or purchases private schooling, is unlikely to have any say in the "form" of the contract. Even the argument that he can go elsewhere if he does not like the terms imposed loses much of its force in those situations where, as in the case of new car sales, "standard" terms are likely to apply wherever the car is purchased. It is in such cases of inequality of bargaining power that legislative and judicial "interference" with the contract is more likely.

It should also be pointed out that "agreement" is judged objectively, thus:

If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.²

So, if A genuinely and reasonably believes that B agrees to his terms, the necessary "agreement" exists, irrespective of B's subjective belief. Suppose, for example,

1. For more on the sources of Hong Kong contract law, see chapter 2.

2. Per Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597.

that A advertises an item on the internet and seeks bids. B offers to buy for \$10,000 and A immediately accepts. There is the objective appearance of agreement and a court would generally ignore a subsequent claim by B that he was “mistaken” and meant to offer only \$1,000. A reasonable person looking at the agreement would say it was a contract to sell for \$10,000 and this would be the legal position. A similar situation arose in *Centrovincial Estates plc v Merchant Investors Insurance Co Ltd*.³ Here the plaintiffs, in renegotiating a lease, “offered” a rental of £65,000 per year, which the defendants accepted. The plaintiffs pleaded that there was no contract as they had been “mistaken”. The previous price was over £68,000 per year in a rising market and the plaintiffs said that they “meant” to state a price of £126,000 per year. The court upheld the figure of £65,000 since it had been clearly expressed in writing and accepted by the other party.

It would have been different if it could have been clearly shown that, in the circumstances of the case, the defendants must have known that the plaintiffs were making a mistake and took advantage of the situation.⁴ In the absence of conclusive evidence of such bad faith, however, there was, “objectively”, an offer to let at £65,000 per year and an acceptance thereof.⁵

Agreement is generally viewed as comprising two elements: an offer by one party and an acceptance of that offer by the other.⁶ There are exceptional cases where contracts have been upheld although agreement, at least in terms of offer and acceptance between the so-called “parties”, is difficult to discern. In *Clarke v Dunraven*,⁷ the respondent’s boat was sunk by the appellant’s boat, during a sailing race, as a result of the appellant’s breach of the race rules. All parties in the race had agreed with the organisers to abide by the rules and, in the event of non-compliance, to pay compensation for any resulting damage. The House of Lords, in upholding the respondent’s claim, found that there was a contract between appellant and respondent though neither had made an agreement with the other. Given the absence of a developed tort of negligence at the time this case was decided, the only potential remedy available to the respondent lay in contract⁸ and the decision may be viewed as one in which the court did justice by means of extreme “creativity”.⁹ Certainly the parties were happy to agree to the terms of the race, but it was surely artificial to imply that the plaintiff and defendant had made an “agreement” with each other. Without disapproving this decision, the highest courts have upheld the principle, in

3. [1983] Com LR 158. See also *Tamplin v James* discussed at 10.4.

4. As in *Roberts & Co Ltd v Leicestershire CC* discussed at 10.6.

5. The decision has been criticised: see P. S. Atiyah, “The Hannah Blumenthal & Classical Contract Law”, (1986) 102 LQR 363.

6. There must, it is said, be a meeting of minds or *consensus ad idem*.

7. [1897] AC 59.

8. The respondent was entitled to statutory compensation but this was very limited.

9. See 1.2.2.

contemporary cases, that there should invariably be offer and acceptance as between the parties.¹⁰

Nor is it always sufficient to focus on the *existence* of an agreement, since the *time* at which the agreement is formed may also be highly significant. Discussion of this question usually focuses on narrow issues of when (or where) a contract made by telephone, email or fax is concluded. While there may be significant jurisdictional implications in such cases, the “time of formation” involves far wider issues, since so many of the courts’ deliberations are required to focus on the time at which the contract is made. If, for example, one party wishes to rely on an exemption clause¹¹ in the contract, its existence must have been made known to the other party before the contract was concluded. Moreover, where the “reasonableness” of the exemption is significant, this must be judged as at the time the contract was made. Where a party wishes to escape liability to pay damages for misrepresentation,¹² he must prove a genuine and reasonable belief in the truth of his false statement up to the time when the contract was made. It is not enough that his belief was genuine at the time his statement was made. In those rare cases where common mistake¹³ is operative this will require a mistake as to a fundamental state of affairs already existing at the time the contract was made. If a subsequent event fundamentally alters the agreement, it cannot constitute mistake (though it could amount to a “frustration”). The doctrine of frustration itself,¹⁴ which arises where an event occurs after a contract is formed (but before the time for performance) which makes performance impossible, may not be successfully invoked by a party who should have foreseen, at the time the contract was made, the subsequent serious event. In the case of damages,¹⁵ too, the time when the contract was made may be crucial, since the “reasonableness”, and hence enforceability, of the pre-estimate of loss in a so-called “liquidated damages” clause is judged as at the time the contract was made, not in light of what actually happened as the result of one party’s breach.¹⁶ Moreover, a party in breach will only be liable in damages for consequences which should have been foreseen as likely to result from the breach at the time the contract was made.

In summary, the circumstances existing when the parties *agree* a contract may have profound consequences for the contract later.

While agreement is always necessary, it is not sufficient, in itself, to prove the existence of a contract. Given a clear agreement between the parties, other requirements remain to be fulfilled.

10. See, for example, *Gibson v Manchester CC* discussed at 3.2.

11. See 8.6.

12. See chapter 9.

13. See 10.3.2.

14. See 14.4.

15. See 15.1.

16. The civil law approach is different and it appears that English law may be changing in this area (see chapter 15).

For hundreds of years in England, and throughout Hong Kong's common law history, the further requirement of "consideration"¹⁷ is demanded in all cases of contracts made other than under seal.¹⁸ Thus,

the growth of the doctrine of consideration as a limitation on what promises will be enforced seems to have been prompted by the adoption in the sixteenth century of a new form of action, the action of *assumpsit*, to enforce promises. Before that, promises were actionable in the royal courts only if they were part of one of a recognised type of exchange such as a sale, or were made (under seal)¹⁹

The consideration requirement has proved an extremely elastic one and most of the "rules" of consideration are subject to exception, as we shall see in chapter 4. Where the courts have wanted to enforce an agreement they have normally been able to discover consideration. In short, the requirement of consideration remains but is capable of considerable "adaptation" by the courts where appropriate.

It is also now generally accepted that a contract requires an intention²⁰ to be bound by both parties. While this proposition is a relatively new one and is not without its critics (notably Professor Williston),²¹ the cases indicate that intention must be viewed as a separate, essential element for the formation of a contract, albeit that intention, like agreement, must be judged "objectively".²²

The agreement on which a contract is based is also subject to the rules of contractual capacity²³ and, exceptionally, to any special requirements as to form.²⁴ Further, even where a contractual agreement contains all the necessary requirements for its formation there may be some "vitiating" element, such as misrepresentation or mistake, which precludes, in whole or in part, the enforcement of the agreement.²⁵

It is "enforceability" which distinguishes contracts from other forms of agreement. Enforceability does not mean that a party in breach can be required to perform his contractual undertaking; such a requirement ("specific performance") by the courts is the exception rather than the rule. What an "innocent" party may always do, however, is obtain compensation for the consequences of the other's breach. Where such breach has caused no loss, the court will award nominal damages in recognition of the breach. Traditionally, via the principle of "sanctity", courts have always enforced contracts whatever the circumstances of the failure to perform. The

17. See chapter 4.

18. This was once a cumbersome procedure involving waxed seals but is now very simple. Indeed, many businesses conclude their agreements under seal to avoid the consideration requirement.

19. Beale, Bishop and Furmston, *Contract Cases and Materials* (Oxford: Oxford University Press, 5th edn, 2007), p 8.

20. See chapter 5.

21. See chapter 5.

22. See, for example, *Jones v Padavatton* [1969] 1 WLR 328, [1969] 2 All ER 616.

23. See chapter 6.

24. See chapter 7.

25. See chapters 9–12.

word “sanctity” implies a moral element, that parties ought to keep their side of the bargain because they have formally promised to do so. Such a moral aspect is now generally rejected in favour of more pragmatic approaches. It would now be more common to view the enforcement of agreements as producing certainty in the market place, or preventing parties taking the law into their own hands. Economic approaches talk in terms of whether it is more “efficient” to perform rather than pay compensation for non-performance and the moral aspect of keeping a promise is rarely expressed. Nevertheless, even with the innovation of “frustration”, a limited exception to sanctity introduced in the nineteenth century, courts remain reluctant to excuse non-performance. A finding of frustration is exceptional²⁶ and a party who fails fully to complete his side of the contract is almost invariably liable for breach.

1.1.1 The Boundaries of Contract Law

Before considering the function or purpose of contract law, we will first try to outline what areas a typical contract law text, such as this, will deal with. It might be thought that “contract law” would include study of all types of contract, but this is not the case. Some areas, especially those which are highly specialised or statute-based, are dealt with as separate subjects in their own right. Contracts of employment, for example, are treated, generally, as falling within the scope of “employment law”. This has much to do with the fact that legislative rules are far more important in this area than common law²⁷ contractual principles. When considering the employee’s contract of employment, for example, we say that the contract may improve the employee’s guaranteed statutory rights but cannot diminish them, irrespective of its express terms. Such a limitation on the parties’ “freedom” applies in both England and Hong Kong, though it should be appreciated that the protection of employees’ “rights” is far less developed in Hong Kong. Likewise, specialised treatment of “sale of goods” contracts tends to be dealt with in “commercial law”, again because the subject is highly statute-based. As a final example, detailed treatment of the sale of land is more likely to occur in the context of “land law” or “real property law”; once again the relevant rules are primarily statutory rather than “common law”.

The huge diversity of contract types has led some commentators to say we should talk of a law of “contracts” rather than contract, just as, in respect of non-contractual obligations, we talk of a law of “torts” rather than tort, on the basis that there are few principles common to all torts. The analogy is questionable, however, because, while we can see that there is little similarity between, for example, the torts of negligence and defamation, there are rules common to all contracts. Sale

26. See, for example, *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, [1956] 3 WLR 37, [1956] 2 All ER 145.

27. While “common law” has various meanings (see chapter 2), in this context it refers to those rules deriving from cases rather than legislation.

of goods, for example, may be a specialised area, but the more specific rules will not begin to operate unless the basic contractual elements (agreement, consideration and so on) exist. The concept that there are basic rules applicable to all contractual situations was emphasised in the case of *Cehave v Bremer (The Hansa Nord)*²⁸ where Roskill LJ responded to the argument that there should be a different classification of terms in sale of goods contracts by stating:

Sale of goods is but one branch of the general law of contract. It is desirable that the same legal principles should apply to the law of contract as a whole and that different legal principles should not apply to different branches of that law.²⁹

This view lends support to the view that judges should recognise some generally applicable contractual principles. These may be amended, or dispensed with, by legislation but, absent legislation, these general contractual principles will apply.

In short, the focus of this book will be on the general principles applicable in the law of contract. The order of substantive topics will be:

- the necessary elements for the formation of a contract (chapters 3–7);
- the contents, or terms, of a contract (chapter 8);
- “vitiating” elements which make the agreement defective in some way (chapters 9–13);
- how contracts come to an end (termination) (chapter 14); and
- remedies for breach of contract (chapter 15).

The final chapter (chapter 16) is about “privity” of contract, the basis of which is that only parties to the contractual agreement have rights and obligations under it. Since “agreement” is our starting point, privity can be seen as completing the circle.

It may seem odd that, although we will not consider all types of contract in depth, we do find time to consider some overlapping areas of tort law which deal with obligations arising other than through agreement. However, tort is relevant to the study of misrepresentation, for example, since, while misrepresentations “induce” the making of a contract, damages for misrepresentation are tortious. Consideration of these remedies is within the scope of this book since to deal with the meaning of misrepresentation but not its consequences would be artificial. Similar overlaps will be apparent when we deal with attempts to exclude liability in contract and tort and when we look at the difference between the “remoteness” rules in contract and tort. No detailed tort knowledge will be required, however, to understand this text.

The contract law we will examine in this book is built, primarily, on two foundations: the cases, or “precedents”, which form its overall framework, and the legislation which has supplemented this case law, or “common law” as it is also known. Since Hong Kong law, post-1997, comprises a unique blend of English common

28. [1976] QB 44, [1975] 3 WLR 447, [1975] 3 All ER 739.

29. [1975] 3 All ER 739 at 756.

law and legislation, Hong Kong common law and legislation and, to lesser extents, Chinese customary law and legislation, chapter 2 is devoted to the sometimes complex issue of the “sources” of Hong Kong contract law.

1.2 The Function of Contract Law

Some writers draw a distinction between the role of the contract and the role of contract law. The former may often be expressed in quite limited terms, such as “informing” the parties of their respective rights and obligations and assisting their “planning”. The focus here will be on the function of contract law; asking what it does and, by implication what would happen if we had no law of contract.

Until comparatively recently the predominant theory of contract could be described as the “will theory”—that the role of the courts was to identify and enforce the contractual will of the parties and to intervene as little as possible in respect of bargains freely made by competent adults. The emphasis has been on contractual “freedom”. Freedom of contract remains a dominant principle in the United States where state intervention in the free market is strongly resisted.

More recently, in England and, to a lesser extent, Hong Kong, it has been possible to identify a more “interventionist” approach by legislation and the courts. Such intervention has been broadly “protectionist”—seeking to support the weaker contracting party from the “dominance” of the other, stronger party. This approach can be discerned, legislatively, in the area of employees’ rights, consumer protection and anti-discrimination laws. Judicial intervention can be seen in the increasingly restrictive approach to exemption clauses³⁰ and the expansion of the doctrines of “duress” and “undue influence”.³¹ Interventionism is based on the premise that complete freedom of contract tends to favour those who have more negotiating power because of their greater resources, contractual experience, access to legal advice and so on.

It is the “balance” between freedom of contract approaches and intervention to assist the weaker party with which we will be chiefly concerned in this chapter.³²

1.2.1 *The Will Theory of Contract*

In classical contract theory the role of the courts is to permit, even encourage, free bargaining by competent adults. The function of the court, if called upon, is to discover the true nature of the parties’ agreement and, in the case of breach of

30. See 8.6.

31. See chapter 11.

32. There are, of course, far more radical approaches to contract law, some of which see law in general and contract law in particular in a far less favourable light. Such theoretical approaches are outside the scope of a book of this nature.

such agreement, to compensate the innocent party. This theory reached its high point in the highly industrialised, economically dominant England of the nineteenth century. The theory was underpinned by the twin ideals of “freedom of contract” and “sanctity of contract”. The notion of freedom of contract is not merely that an agreement is required but that such agreement represents the entire contract; provided the agreement was made freely, the courts and legislature should not intervene. Only in the event of a breach of the agreement should the courts be concerned. A classic definition of the freedom (and sanctity) of contract approach is provided by Jessell MR:

(if) there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts . . . entered into freely and voluntarily shall be held sacred.³³

There have always been exceptions or qualifications to this theory in its pure form. Courts have always asserted the right to “police” the bargain and a freely-made contract will be invalidated if it is shown to be illegal or induced by one party’s fraud. Since the agreement must be a genuine one, the common law has long recognised the vitiating element of duress (the use or threat of physical force) as invalidating a contract if the “victim” so wishes. Given the narrow constraints of traditional duress, equity developed a doctrine of undue influence where

one party had induced the other to enter into the transaction by actual pressure which equity regarded as improper but which was formerly not thought to amount to duress at common law because no element of violence to the person was involved.³⁴

Duress itself has been considerably expanded by a recognition by the courts that it can apply to “economic” as well as physical pressure. Even in the absence of wrongdoing by either party, mistakes of a fundamental nature may render a contract void, though this occurs rarely in practice.

Since it is also implicit that agreements will be enforced only against competent parties, rules on capacity restrict the scope of minors, drunkards and the mentally ill to make enforceable agreements. Further, since corporations can impose their own restraints on their contractual capacity via their memorandum and articles of association, the courts have the power to declare a company’s contracts *ultra vires*. However, given that Hong Kong law no longer requires a memorandum of association, this is unlikely to be a problem in practice.

Long before the development of consideration, intention and the various vitiating elements, English law restricted the making of informal contracts by the requirement that certain contracts had to be made under seal, in writing, or via written evidence. The Statute of Frauds, 1677, initially required that various categories of contract had to be evidenced in writing. Most of these formal requirements have

33. Cited in Beale, Bishop, and Furmston (n 18 above), p 47.

34. E. Peel, *Treitel: The Law of Contract* (London: Sweet & Maxwell, 14th edn, 2015), pp 506–507.

now been abolished. However, one important category remains of great significance in Hong Kong: contracts for the sale or other disposition of land, which must be evidenced in writing or supported by an unequivocal act of part performance.³⁵

The most significant interference with contractual “freedom”, however, arises via the intervention of “implied” terms. Implied terms are regarded as part of the contract even though not expressed by the parties. Such terms may arise through the custom of a particular trade or market, to give “business efficacy” to a contract, or where the term is seen as omitted only because it is so obvious it “goes without saying”. In all these cases the implied term may be viewed as part of the parties’ “real” intention; something they meant to include but did not or, at the very least, something they would have included if they had considered the matter more carefully.

However, the traditional view, that implied terms do not undermine contractual freedom but are merely an expression of the parties’ true intention, can no longer be viewed as absolute. Many statutory implied terms are now non-excludable even by the clearest exemption clauses, even if such exemptions have been read, understood and signed by the party seeking to escape the exemption. Such statutory implied terms are legislative consumer protection which owes nothing to the expressed “will” of the parties. While such consumer protection legislation is more widespread in England, the (previously) most important restriction on exemption clauses, the Unfair Contract Terms Act 1977 (now largely superseded by the Consumer Rights Act 2015) has been reproduced with little amendment in Hong Kong via the Control of Exemption Clauses Ordinance (CECO). There are also terms implied “in law” which cannot be said to be based on the parties’ presumed intention but are simply required to be present in contracts of a certain type.³⁶

It is more common, therefore, to regard “freedom of contract” as a concept steeped in the ideology of nineteenth century “laissez-faire” industrial England and long abandoned in favour of more “protectionist” judicial and statutory intervention. Increased intervention, in England, would be seen as a natural consequence of a move from a free market economy to a more welfare-based society.³⁷ The interventionist trend appears to have continued despite over 20 years of Conservative and “new right” Labour government. Freedom of contract still has its adherents, however, especially in the still-significant economy of the United States. The American view remains that intervention into the contractual agreements of individual, cognisant adults should be exceptional and restricted. It might be assumed that Hong Kong’s less welfare-oriented political system would be reflected in a free-market, non-interventionist approach to contract but this is not entirely the case.

35. In England these formal requirements have become more restrictive since the contract must now be written as opposed to evidenced in writing and the (equitable) part-performance doctrine has been abolished.

36. See *Liverpool City Council v Irwin* [1977] AC 239 and 8.4.

37. See, for example, P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979).

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